No. 80-932

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

HAROLD S. LENTZ
Southern Pacific Building
One Market Plaza
San Francisco, Calif. 94105
Telephone: (415) 362-1212
Attorney for Appellant

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

TABLE OF CONTENTS

Page

I

Appellee's statement of question presented 2

II

Appellant has not challenged the California Supreme Court's jurisdiction to interpret California statutes and the Commission's reliance upon this Court's decision in the Quong Ham Wha Co. case is erroneous 4

III

The Commission's contentions ignore the explicit statements of the California Supreme Court in the Consumers Lobby case 5

Conclusion 7

TABLE OF AUTHORITIES CITED

Cases

Consumers Lobby Against Monopolies v. Public Utilities Commission, 25 Cal.3d 891 (1979) 3, 5, 6, 7

Napa Valley v. Railroad Commission, 251 U.S. 367 (1920) 6

People v. Western Airlines, Inc., 42 Cal.2d 621 (1954) .. 5, 6

Quong Ham Wha Co. v. Industrial Accident Commission, 255 U.S. 445 (1921) 4, 5

Southern California Edison Co. v. Railroad Commission, 6 Cal.2d (1936) 6

Constitution

United States Constitution, Fourteenth Amendment: .. 7

Section 1 ..... 2, 3

No. 80-932

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

VS.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellant, Southern Pacific Transportation Company, files this brief in opposition to the Motion to Dismiss or Affirm of the Appellee (sometimes hereinafter referred to as "the Commission"), dated January 8, 1981.

I

APPELLEE'S STATEMENT OF QUESTION PRESENTED

Although the Court's rules do not appear to so require, the Commission has undertaken to present a statement of the "Question Presented" in the forefront of its Motion to affirm or dismiss. While not completely clear, it would appear that this is an attempt to *restate* the question presented as set forth in the Jurisdictional Statement, since it does not give any indication of the grounds or arguments to be relied upon in the Motion.

As a purported restatement of the question presented by the Jurisdictional Statement, the Commission's "Question Presented" as set forth in the forefront of its motion is erroneous in at least two respects. First, it completely ignores Appellant's actual statement of the question presented, which is whether California statutes with respect to review of decisions of the Commission, "as presently construed and followed by the California Supreme Court", violate the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States. The Commission apparently desires to have this Court view the matter as involving *only* a question of whether the actual denial of review by the California Supreme Court in this case was erroneous. However, as clearly established by footnote 1 with respect to the Question Presented in the Jurisdictional Statement, that is a secondary question. To reiterate, the basic question presented by this appeal is whether California statutes with respect to review of decisions of the Commission, "as presently construed and followed by the California Supreme Court", satisfy the

requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

A further problem with the "Question Presented", as stated in the forefront of the Commission's motion, is that it contains an assertion that Appellant "failed to impress the California Supreme Court with the merit of its appeal below". It is submitted that, in view of the California Supreme Court's decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission,* 25 Cal.3d 891 (1979), it is not possible to make such an unequivocal factual assertion. The assertion is purely a speculative assumption on the part of the Commission. True, the California Supreme Court has made it clear that it does not want to review the decision since it has denied review. However, its denial was without opinion and, in view of the California Supreme Court's opinion in its *Consumer Lobby* case, it is not possible for anyone to know whether or not any of Appellant's arguments or contentions did or did not impress the California Supreme Court.

The question presented in the Jurisdictional Statement could be stated in an alternative manner as being whether California statutes, as construed and followed by the California Supreme Court, permit arbitrary or capricious denial of review of decisions of the Commission and thereby violate fundamental requirements of the Fourteenth Amendment. There is yet another way it could be stated, i.e., can the California Supreme Court, consistent with Federal constitutional requirements, deny review of Commission decisions, regardless of whether or not it is impressed with the merits of the questions involved. However, the Commission's purported restatement is incomplete and

not consistent with the actual statement of the Question and issues presented in the Jurisdictional Statement and, like the rest of the motion, appears to be an attempt to divert the Court's attention from the actual contentions in the Jurisdictional Statement by setting up and addressing a "straw man" issue.

II

APPELLANT HAS NOT CHALLENGED THE CALIFORNIA SUPREME COURT'S JURISDICTION TO INTERPRET CALIFORNIA STATUTES AND THE COMMISSION'S RELIANCE UPON THIS COURT'S DECISION IN THE QUONG HAM WHA CO. CASE IS ERRONEOUS

The Commission first asserts that the interpretation of California statutes is the responsibility of the California courts (Motion, p. 2) and then proceeds to assert that the Jurisdictional Statement raises only a "frivolous" federal question which should be dismissed on the basis of this Court's decision in *Quong Ham Wha Co. v. Industrial Accident Commission,* 255 U.S. 445 (1921) (Motion, p. 3). The Commission's assertion is erroneous for the simple reason that the situation in this proceeding is exactly the opposite of that which prevailed in the *Quong Ham Wha Co.* case.

Appellant does not challenge the jurisdiction of the California Supreme Court to interpret California statutes. This is clear from the statement of the Question Presented in the Jurisdictional Statement, which expressly deals with California statutes "as presently construed and followed by the California Supreme Court". This is precisely the opposite of the position taken by the appellant in the

Quong Ham Wha Co. case. In that case, the appellant was contending that the statute involved was unconstitutional "despite the construction made by the court below" (page 449). That is not the situation herein. As already pointed out, in this proceeding Appellant contends that the California statutes providing for review of decisions of the Commission are repugnant to the Federal Constitution *because* of the way they are "presently construed and followed by the California Supreme Court".

III

THE COMMISSION'S CONTENTIONS IGNORE THE EXPLICIT STATEMENTS OF THE CALIFORNIA SUPREME COURT IN THE CONSUMERS LOBBY CASE

At pages 2-3 of its Motion, the Commission states:

> "The denial of review by the state supreme court fully affirms that the Commission's interpretations of the dispositive provisions of the Public Utilities Code were proper in light of state law. *People v. Western Airlines, Inc.*, 42 Cal.2d 621, 630-631 (1954)."

What is significant about this statement is that the Commission cites only the Western Airlines case whereas, if the *Consumers Lobby* case did not significantly alter the nature of the review process, as contended by the Commission on page 4 of its Motion, it should also have been cited in support of this proposition.

In the absence of the decision in the *Consumers Lobby* case, the above-quoted statement expresses the holding of the *Western Airlines* case as it has long been understood by the Commission and the Appellant, as well as others,

prior to issuance of the *Consumers Lobby* decision. Moreover, it may also express the understanding and interpretation that this Court placed upon the decision in *People v. Western Airlines* when it dismissed the appeal from that decision on the ground that it did not raise a substantial federal question (348 U.S. 859 (1954)). However, the California Supreme Court has made it clear that the Commission can no longer assert, as it did in the *Consumers Lobby* case and so it is now doing in its Motion, that denial of review without opinion fully affirms the Commission's interpretations of California law. As the California Supreme Court stated in *Consumers Lobby,* (supra) (p. 905; see also Appendix to Jurisdictional Statement, p. G-9), a summary denial of review does not set forth any reason why review has been denied and according to the California Supreme Court, it would "therefore be sheer speculation for litigants to rely on such decisions as precedents." If that is the case, then it is also "sheer speculation" for the Commission to assert that denial in this case represents a holding that the Commission's interpretation of state law was correct.

The Commission also cites this Court's decision in *Napa Valley Electric Co. v. Railroad Commission,* 251 U.S. 367 (1920) and the California Court's decision in *Southern California Edison Co. v. Railroad Commission,* 6 Cal.2d 737 (1936) in support of its Motion. However, once again, the Commission has failed to recognize that, while those decisions are consistent with the long-established general understanding of the meaning of the *Western Airlines* decision, they are inconsistent with the California Supreme Court's decision in the *Consumers Lobby* case. The *Consumers Lobby* case actually constitutes a significant re-

interpretation of the California statutes providing for review of decisions of the Public Utilities Commission so as to hold that the California Supreme Court may arbitrarily grant or deny petitions for writ of review. This was discussed at length in the Jurisdictional Statement at pages 20-23, to which the Court is respectfully referred rather than repeating the argument herein. The California Supreme Court's decision in the *Consumers Lobby* case is simply inconsistent with any contention that a denial of review represents a holding that the Commission correctly interpreted the State's statutes or did not exceed its statutory authority. Otherwise, it would have not been necessary for the California Supreme Court, in *Consumers Lobby* (p. 905), to warn that it would be "sheer speculation" for litigants to try to determine what the reasoning of the Court was when it denies review.

CONCLUSION

The approach of both the California Supreme Court in the *Consumers Lobby* case, and the Commission in its Motion to Dismiss or Affirm, seems to be one of encouraging future litigation with respect to each and every decision of the Commission. Appellant submits that the proper judicial approach should be just the opposite. Parties should be made aware of how laws are being interpreted so as to avoid unnecessary future litigation. Appellant respectfully submits that the California statutes, as interpreted by the California Supreme Court in the *Consumers Lobby* case, do not make available an adequate opportunity for review which this Court has held is required by the Fourteenth Amendment to the Constitution of the United States (see page 18 of the Jurisdictional Statement). It also submits

that the California Supreme Court, wholly apart from its interpretation of state law, will be seen to have acted arbitrarily in denying review when the record is certified to this Court. The Motion to Dismiss or Affirm does not set forth any legal basis for granting the motion and Appellant respectfully submits that the motion should be denied.

Dated: January 16, 1981

San Francisco, California

Respectfully submitted,

HAROLD S. LENTZ
Southern Pacific Building
One Market Plaza
San Francisco, Calif. 94105
Telephone: (415) 362-1212
Attorney for Appellant